Number 369

In the Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner

vs.

R. E. ELLZEY, Respondent

STATEMENT AND BRIEF OF RESPONDENT

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Attorneys for Respondent.

SYNOPSIS

Ellzey, a Deputy U. S. Marshal, a passenger for hire, while guarding the driver of a motor car during the general shopmen's

strike of July, 1922, was injured by the car being driven at a negligent rate of speed.

The trial court instructed the jury in substance that Ellzey would be guilty of contributory negligence if he directed, encouraged or acquiesced in the fast speed. The plaintiff objected to this presentation of the case, and requested the court to give a peremptory charge for plaintiff—Record 206-207. The court refusing to direct a verdict for plaintiff, he requested a charge eliminating the question of contributory negligence, by instructing the jury that if the driver was acting within the scope of his authority, to find for the plaintiff,—this being refused, the plaintiff insisted that Ellzey being a passenger, would not be guilty of contributory negligence in urging or encouraging fast speed, unless he *knew* that his safety was endangered.

The trial court instructed the jury that he would be guilty of contributory negligence if a reasonable man would have acted differently. The plaintiff insisted that a passenger, as Ellzey was, would not be guilty of contributory negligence unless he had actual knowledge that he was encouraging a rate of speed that endangered his safety.

These matters were raised by special charges, and objections and exceptions to the Court's Charge.

The jury retired to consider their verdict, and later returned into court, and asked what would constitute contributory negligence on the part of the plaintiff. The court told them in substance that if the plaintiff acquiesced in fast running, he would be guilty of contributory negligence, and did not explain that if the driver with knowledge of such conduct on the part of the plaintiff, thereafter negligently caused the injury, that the jury might find plaintiff's negligence to be the remote, and the driver's negligence the direct or sole cause of the wreck, and thereby acquit the passenger of contributory negligence.

The plaintiff objected to this charge, but was not given (in

fact was denied) opportunity to explain his reasons for objecting to it,—in that the defendant protested against plaintiff being permitted to state his objections, and the court acquiesced in the position taken by the defendant, and declined to permit the plaintiff to make full objections.

The Circuit Court of Appeals reversed the case because—the court erred in giving the charge on contributory negligence, which dircted the jury to find plaintiff guilty of contributory negligence if he acquiesced in fast speed, though such negligence may have been remote, and the subsequent negligence of the driver, the direct or sole cause of the wreck.

GENERAL STATEMENT

The respondent will be referred to in this brief as plaintiff, and the petitioner as defendent.

The plaintiff, referring to the statement of the case in the brief of the defendent, calls attention to the following additional contentions made by the plaintiff, viz:

The plaintiff was a passenger for hire.

The uncontroverted evidence showed that the wreck was caused by the car being operated at a high and reckless rate of speed.

The charge of the court as a whole was to the effect that if plaintiff encouraged, or acquiesced in the fast operation of the car, he was guilty of contributory negligence; and did not make knowledge on his part of the danger a test as to his contributory negligence, and did not relieve him of negligence, if he did not in fact know that it was dangerous.

The plaintiff contended, and still contends that the trial court should have directed a verdict for plaintiff (Weisshaar vs. Kimball F. S. Co., 128 Fed. 597; 63 C. C. 139) and after answering defendant's assignments of error, will present more fully his reasons for that contention.

ANSWER TO DEFENDANT'S BRIEF AND ASSIGNMENTS

If this court should conclude that the point on which the case was reversed was not raised by the exceptions to the charge, nevertheless the reversal should be sustained on account of other errors properly complained of in our brief in the Circuit Court of Appeals, which will be presented in this case after our answer to the brief of the defendant.

The charge of the court on contributory negligence was an incorrect statement of the law,—of such character as to result in injury to the plaintiff.

Defendant's First Assignment of Error presents the contention that the portion of the charge quoted in the opinion of the Circuit Court of Appeals as the basis for reversal of this case, correctly announced the law; but it fails to present any applicable authorities, and practically abandons that theory, and endeavors to show that the charge of the court on contributory negligence taken as a whole was correct, and that if the charge on contributory negligence was incorrect, that no sufficient exception was reserved by the plaintiff.

The defendant contends that the Circuit Court of Appeals erred in holding:

1. That the charge referred to by it erroneously stated the law.
2. That the said charge should have been considered in connection with the whole charge, and when so considered, was not erroneous.
3. That the plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that particular charge.

The plaintiff contends that under the circumstances, the particular charge having been given in response

to a request of the jury for a statement of the law, as to when plaintiff would be guilty of contributory negligence, that it should stand or fall as a concrete charge on the subject unaided by the main charge given orally, and which the jury clearly had forgotten, or did not understand.

The plaintiff made objection to the particular charge, and was prevented from stating detailed objections by protests made by defendant, and acquiesced in by the court (Record 206), and saved his exception under an assurance of the court, that he would be allowed his exceptions to the charge. (Record 206).

It is believed that while the passenger in some situations may be guilty of contributory negligence, in doing or failing to do what a reasonably prudent person would or would not have done; that as to acquiescing, advising or encouraging in, or asking for fast speed, his conduct must be based on a *knowledge* of danger in order to constitute contributory negigence. If it were otherwise, the mere suggestion of the impatient passenger that the carrier was not getting him over the road fast enough, would raise the issue of the passenger's contributory negligence barring a recovery caused by negligent speed.

Referring to the authorities cited under defendant's First Assignment of Error, we merely direct the attention of this court to the fact that the Harding case (Wis.) was a suit by a gratuitous guest who being equally responsible for the negligence, was not permitted to recover from his host.

The other cases are those in which the joint negligence of one in a carriage with that of the driver is a bar to a recovery against a third party.

No case has been cited, nor do we expect any well considered

case to be referred to, which holds that the negligence of the driver is imputable to the passenger for hire, in a suit by the passenger against the carrier. Conduct, if any, which would relieve the carrier of negligent operation, must be such as practically wrests from the carrier, the control of the vehicle.

Certainly there can be no implied negligence by reason of an acquiescence in reckless speed, unless it is based upon actual knowledge of danger by the passenger, and a failure to avail himself of an opportunity to abandon the vehicle.

A passenger for hire, as was the plaintiff, can not be held guilty of contributory negligence, as to the speed of the vehicle, unless he knows that his safety is in danger, and has an opportunity to avoid it. In other words, the question of what a reasonable prudent person would have done can not be made a test, and in all cases, though the passenger may be negligent, it is the duty of the carrier to protect him against such negligence. Therefore, the failure to discharge that obligation of protecting the passenger against his negligence, may become the immediate or sole cause of his injury, and the negligence of the passenger, the remote cause thereof.

We agree to, in fact we invoke, the doctrine that the charge must be considered as a whole, and that language inadvertently used will not control. Defendant contends that if the charge contains any language correctly stating the law, that such language controls. We contend that where the entire context conveys to the jury an erroneous view of the law by prescribing the wrong rule; that inadvertent language correctly stating the law, but not used in a way to clearly submit the rights of the parties does not relieve the charge of its vice—that is to say, that correct language used in an inadvertent way no more cures the vice of a charge erroneous when considered as a whole, than does incorrect language inadvertently used destroy the charge which is correct when considered as a whole.

The charge when fairly considered in the connection and

under the circumstances, gave an incorrect presentation of contributory negligence, and it can not be cured by the inadvertent use of a sentence favorable to the plaintiff; you can not change a gourd blossom to a rose by the use of a few drops of perfume.

The Circuit Court of Appeals correctly held that the charge on contributory negligence was erroneous.

Exceptions were reserved by the plaintiff to the charge on contributory negligence, and to the particular charge referred to in the opinion of the Circuit Court of Appeals (R-205-206).

A more detailed statement of the grounds of objections to the charge referred to, was prevented by counsel for defendant, acquiesced in by the trial court. (R-206).

The plaintiff excepted to the objectionable charge, and offered to state his objection to this charge given in response to the request of the jury for a definition of contributory negligence, and was prevented from doing so by the court at the request of the defendant. The defendant should not now be permitted to contend that plaintiff would not have urged the specific exception, or objection, that the charge authorized the jury to convict plaintiff of contributory negligence barring his recovery, though they might find that such negligence was a remote, and not the proximate cause of the wreck.

We shall not attempt to discuss the authorities relied upon by the defendant as to the necessity for exceptions to the charge to be taken, further than to call attention of this court to the fact that they recognize the rule that a party is only cut off from the right to urge objections to charges erroneously stating the law, where such party is given "full opportunty" to except to the charge. Thus in Norfolk Ry. Co. vs. Earnest, 229 U. S. 114, it is said:

> "The record discloses that full opportunty for presenting objections was afforded, and that the one now pointed out was not made."

Boyett vs. U. S. 271, U. S. 104:

"With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor."

We feel it unnecessary to cite other authorities to sustain our contention that inasmuch as the defendant aided in preventing us from having full opportunity to point out the particular vice of the charge given in response to the jury's request, that the defendant can not now complain that we failed to do the very thing it aided in preventing us from having an opportunity to do, than those above referred to, taken from the authorities relied upon by the defendant in support of its contention, that timely objection must be made to the court's charge. We consider that the defendant has selected the strongest cases. We know that common fairness demands the enforcement of the rule that a party is not denied his right to except to objectionable charges, where through no fault of his, he is not given opportunity in the trial court to present his objection.

We again call attention to the fact that the courts in denying the right to urge objections on appeal have usually based it on the additional fact that the error was probably harmless, and that the language was inadvertently used, as well as the failure of the party complaining to specifically point it out in the lower court.

We have stated in another portion of this brief that we subscribed to the rule that the charge on any subject must be considered as a whole in an effort to ascertain the view the jury probably took of the same, considering the language used; and to this we add, 'under the circumstances of the situation.' We find no fault with the authorities relied upon by the defendant, to support the contention that the charge must be so viewed, and that seasonable objections must be taken, provided a fair opportunity to make such objections is given. But the rules of common fairness should not be lost sight of, and we believe that when the jury came into court, and requested the court to tell them the circumstances under which the plaintiff would be guilty

of contributory negligence, and the court undertook to comply with that request, it then devolved upon the court to give a full and complete charge upon contributory negligence. The Court undertook to do this, giving a charge which was understood to be, accepted by the jury as their complete guide on that question. The court in discharging this duty, gave a charge on contributory negligence, which is clear and unambiguous, but very erroneously states the test, and fails to tell the jury that if the negligence, if any of plaintiff, was the remote or not the proximate cause of the injury, and the negligence of the defendant was the sole cause of the injury, that it would not constitute contributory negligence, and therefore would be no bar to his recovery. The plaintiff made an objection to the charge first given in response to the request of the jury, and the court undertook to clear up the objection as he viewed it, but instead of doing so, committed the graver error of telling the jury that plaintiff would be guilty of contributory negligence by acquiescing in fast speed, without removing himself from the car at the "earliest possible moment," and did not tell the jury that in order to convict him of contributory negligence, they must find that he appreciated the fact that such fast speed endangered his safety, and did not tell the jury that if the defendant had an opportunity to have prevented the injury by the use of proper care, that the plaintiff's negligence would be considered the remote, and the defendant's negligence the proximate cause of the injury. The plaintiff made objection to this charge, and was prevented from giving details—in other words, he was not given full opportunity to except to the charge, and point out its deficiencies. Surely he was not required to get into an unseemly controversy with the court, in the presence of the jury, as to his right to except to the charge—in fact, the court and counsel for the defendant took full responsibility—counsel for defendant by objecting to the plaintiff being permitted to state his exceptions, and the court by acquiescing in the objection of such—and the court saying that the plaintiff's rights would be protected by a bill.

In considering the question of whether the charge on contributory negligence was error, and the bearing special charges requested by plaintiff, and given, should have upon the review of the errors complained of, it is not only important, but necessary to take into consideration the special charges requested, and refused, and the order in which they were so requested, for each and all of the special charges requested by the plaintiff were offered only in the event the ones preceding same were refused.

The defendant contends that the erroneous charge on contributory negligence, for which the Circuit Court of Appeals reversed the case, presents the same principle that was suggested in plaintiff's requested charge No. 3—which the court refused to give, and which is as follows:

> "Again you are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. * * * It was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence." (Defendant's brief, page 16).

The charge so requested by the plaintiff, and refused by the court is so nearly the antithesis of the charge on contributory negligence given by the court, after the jury had requested a definition of contributory negligence, that we shall decline to dis-

cuss the same further, than to say that we think the comparison made by the defendant must have been through inadvertence.

The supplemental charge given by the court on contributory negligence, (R-203-206) should be treated as the entire charge on contributory negligence—in fact, the last sentence thereof, and being the portion upon which the Circuit Court of Appeals based its opinion reversing the case, should be treated as the sole charge on contributory negligence.

The whole charge of the court was verbal or oral (R-213).

The oral charge was somewhat long and tedious, making up pages 182 to 203 of the record, and those portions defining contributory negligence were somewhat involved and contradictory. The jury having considered the case, and apparently concluded that plaintiff's injury was caused by negligence on the part of the defendant, and not being able to remember charge on contributory negligence, returned into open court, and made the following request: (R-203)

"We want to know what would constitute contributory negligence on the part of the plaintiff."

This was no request for elucidation or explanation, but for full instruction on that subject. The court then gave a supplemental instruction on contributory negligence (R-203-204) the substance of which was (R-204) that if the defendant was negligent, but—

> "notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraged in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery."

To the giving of this charge, the plaintiff then and there objected, because it did not limit conduct that would convict the plaintiff of contributory negligence to negligent conduct, etc. (R-205).

The said objection among other things being (R-205):

> "That conduct upon his part, to constitute contributory

negligence, must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence."

The court then attempted to elucidate more clearly his position, but not to comply with the objection, and emphasized his contention that it was not necessary for the plaintiff to know or appreciate that his conduct, or that of the driver of the car endangered his safety in order to convict him of contributory negligence but to put it upon the basis of whether a reasonably prudent person would have anticipated or appreciated the danger—a theory contrary to the exception that we had reserved, which exception and our theory was based upon the fact that the plaintiff was a passenger. Then, the court bringing his theory down to the particular case, and as the last sentence uttered by the court to the jury as the compact statement of the circumstances under which the plaintiff would be guilty of contributory negligence, erroneously charged the jury without limitation as follows:

"In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car (plaintiff) was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence. I think that covers it." (R-205-206).

The plaintiff then and there objected to this new charge, and started to give his reasons for his objections thereto, when the attorney for defendant protested against elucidation, and the

court acquiesced in the position taken by the defendant, saying: (R-206)

"Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill."

Again the court said:

"The plaintiff excepts to the instruction. All right, gentlemen, you may retire." (R-206)

Thus, we see that the court in the supplemental charge directed the jury to convict the plaintiff of contributory negligence if he did anything that contributed to bring about the wreck, regardless of whether it amounted to negligence upon his part, at least he failed to limit conduct on the part of the plaintiff, which would bar a recovery to negligent conduct.

The plaintiff excepted to this charge, and asked the court to clear up the error thus committed, and the court committed the greater error of giving the charge quoted in the opinion of the Circuit Court of Appeals, telling the jury that if the plaintiff acquiesced in the fast running, etc,., that he would be guilty of contributory negligence (R-205-206). The plaintiff asked for bread, and was hit in the solar plexus with a stone.

It is our contention that inasmuch as the plaintiff was a passenger, the harsh rule or doctrine of contributory negligence could not be involked to defeat his rights growing out of the defendant's negligence, unless the pasenger knew or appreciated the danger arising to him therefrom, in respect to the management and speed of the car. In other words that it was not dependent upon what a reasonably prudent, or reasonably careful person would have known and appreciated under the particular circumstances, which the court made the test by the use of the following language: (R-205)

"In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could have reasonably expected such a re-

sult to flow from the course which he had pursued, or he must have omitted to do something which a reasonable man, under the same circumstances would have done in order to avoid the injury."

The language above quoted was used by the trial court immediately preceding that portion of the charge quoted by the Circuit Court of Appeals, as the basis for reversing this case, and it will be readily seen that the trial court did not *inadvertently* use the incorrect language, but incorrectly announced the law in that charge, because he directs the attention of the jury to the fact that it is the last word on the subject. The court saying:

> "In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff urged, directed or counselled the driver of the car to run it at a reckless and high rate of speed, etc . . . "

thereby emphasizing the court's theory that the plaintiff would be guilty of contributory negligence, by acquiescing in or encouraging the speed, regardless of whether he knew or appreciated that it was dangerous.

It is believed that the rule to the effect that objections not urged at the trial, are considered waived, is intended to apply in those cases, where the trial court is not appraised that the charge is objectionable, and when and where the party is given a fair opportunity to present his objections thereto, and does not apply where the court is appraised of the objections urged, or aids in preventing the party from fully stating his reasons for exceptions taken. The authorities appear to be conclusive that the party must be given "*full opportunity*" to object, or he will not be cut off.

In this case the plaintiff had made his position known by special charges requested, and exceptions reserved each,—and all of which pointed out the vice in the charge as given,—unless there was a failure to fully object to the last sentence of the court's supplemental charge,—which we dispute,—and if there was a failure to fully object to that sentence of the supplemental charge,

—the last word of the court on the question of contributory negligence, such failure was due to the interference of the defendant, acquiesced in by the court, by which the plaintiff was prevented from fully stating his objections. He was not given *full opportunity* to object.

Under such circumstances, the Circuit Court of Appeals correctly reversed the case on account of the errors committed by the trial court.

In addition to the cases cited by the Circuit Court of Appeals, we cite the following authorities sustaining our contention that if Ellzey was guilty of contributory negligence in urging or acquiescing in fast running, Merchant knew it, and had opportunity to protect Ellzey against such negligence, and it was his duty to do so,—so we call attention to *Inland Sea Board Coasting Company vs. Tolson*, 139 U. S. 558.

Chunn vs. Washington City Ry. Co., 207 U. S. 302.

Pennsylvania Railway vs. Reed, 60 Fed. 964; 9 C. C. A. 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 *Fed.* 4; 112 *C.* C. A. 583.

10 *Corpus Juris, Section* 1400, page 1107; 6 CYC 631.

It seems to us that there can be no doubt that the plaintiff was injured by the vice in the charge on contributory negligence, pointed out by the Circuit Court of Appeals, and that under the circumstances—in view of the court failing to give, in fact refusing the plaintiff full opportunity to object in detail to the charge, that the Circuit Court of Appeals correctly disposed of this case.

Again we call attention to the fact that the plaintiff did all that he could to present his objections, and that he was prevented from doing so by the defendent urging the court to decline to hear the plaintiff's objections, and that therefore the defendant is in no position to now urge that the plaintiff failed to present detailed objections to said charge.

We feel certain that the Circuit Court of Appeals correctly

held that the trial court committed substantial error against the plaintiff in failing to permit a recovery for him, if he was guilty of negligence in urging or acquiescing in the high speed of the car, but that his negligence was the remote cause of the wreck, and that the subsequent negligence of the carrier in the operation of the car, was the sole or direct cause of the wreck. However, it is believed that regardless of our contention that the Circuit Court of Appeals properly reversed the case on account of the specific errors pointed out in its opinion, that there are many other errors for which the case should have been reversed, and which are pointed out in our assignments of error fully presented in our brief in the Circuit Court of Appeals, and which assignments of error are copied as Appendix A to this brief, and will now be discussed.

OTHER ERRORS FOR WHICH CASE SHOULD BE REVERSED

We direct the attention of this court to the fact that there were other errors for which the Circuit Court of Appeals should have reversed the case, which were duly presented in that court, and for the commission of which this court should reverse the case. These errors were pointed out in the trial court by special charges requested, and exceptions to the charge as given, and to aid the court in understanding the same, we make the following synopsis, and summary before presenting the propositions based upon assignments of error, filed with our petition for writ of error, in the trial court:

R. E. Ellzey, a United States Deputy Marshall in pay of the Government, while on a motor car at the request of the defendant to guard the operator against threatened personal violence during the general shopmen's strike of July, 1922, was injured, by negligent speed.

The defendant alleged the driver was not acting within the scope of his employment, but there was no evidence to raise that issue. It alleged reckless speed, but that Ellzey acquiesced in,

or encouraged it. The proof showed reckless speed caused the wreck, but raised no issue of Ellzey taking control, and barely raised the issue of him advising it. It is believed there was no evidence of his knowledge of danger—no evidence that the operator seriously objected, or was coerced. The court ruled in effect that if Ellzey acquiesced in the speed, he was guilty of contributory negligence. This mis-statement of the law was excepted to, and special charges requested by plaintiff presenting what we believe to be the correct rule.

The driver testified unqualifiedly that he had the right to make the trip in the car (R-151-2). He was not contradicted.

The suggestion that he had had enough wild riding did not amount to a protest, much less show a yielding to force. Ellzey being a passenger for hire, the carrier owed him a very high degree of care, and could not directly or impliedly contract against its negligence.

It was the duty of the carrier to protect the passenger insofar as it was practical to do so.

The operator of a carriage, cannot by heeding the urge of the passenger or acquiescing in his desire, place the burden of contributory negligence upon him.

The passenger is presumed not to have equal information with the carrier, either as to the safety of the conveyance or the speed it is capable of making with safety.

If Ellzey was guilty of contributory negligence in urging fast running, Merchant knew it, and it was his duty to protect Ellzey against his own negligence.

Plaintiff could not be guilty of passive contributory negligence. Therefore, the court erred in giving Supplemental Instructions to that effect.

The plaintiff in his special instruction No. 3 requested the court to give the reverse of this charge (which the court refused). See Court's charge, (R-205) and plaintiff's special charge No. 3, (R-208).

Note: Even if the plaintiff could have been guilty of negligence in the encouragement of the speed (as he could not without taking command of the car and ousting the carrier of control), he certainly could not relieve the carrier by merely passively failing to protest.

It will be noted, that in the Supplemental Charge given, the court placed on plaintiff the burden of contributory negligence: if a person of ordinary care situated as he was would have appreciated the danger. Certainly if any such theory as passive contributory negligence could apply to a passenger, it would have to appear that he knew and appreciated the danger (and not that a person of ordinary care would have known and appreciated the danger), and with full knowledge of the danger had an opportuity to avoid its consequences, and failed to do so.

The theory of the trial court that the carrier could relieve itself of liability as such, without being forced to surrender the control of the vehicle to the passenger, is believed to be inconsistent with our present day civilization—to say nothing of the error in telling the jury that it could relieve itself of its duty as a carrier by heeding the urge, or worse still, by responding to the encouragement of the passenger; and the still worse fallacy of saying that the passenger could lose his rights by failing to protest against the manner of operation.

The plaintiff presents the following propositions:

FIRST

The court erred in not giving our Special Charge "A," being a peremptory charge in favor of the plaintiff on the issue of liability.

Weisshaar vs. Kimball S. S. Co., 128 Fed. 597; 63 C. C. A. 139;

Lynn vs. Southern Pacific Railway Company, 24 L. R. A. 710.

Hutchinson on Carriers, 2nd Edition, Sec. 654C.

Also Drovers pass cases including Norfolk Southern Ry Co. vs. Chatman, 244 U. S. 276.

SECOND

The court erred in instructing the jury in substance that Ellzey would be guilty of contributory negligence if he urged Merchant to run the car at a dangerous rate of speed, and in obedience to such urge Merchant wrecked the car by fast driving, because there was no evidence raising the issue; and if there had been, the carrier could not escape liability by acceding to the request of the passenger to operate the vehicle negligently—it being the duty of the carrier to protect Ellzey against his own negligence, if any there was.

Indianapolis & St. Louis Ry. Co. vs. Horst, 93 U. S. R. 291.

Philadelphia & Reading Ry Co. vs. Derby, 14 Howard 486.

The Steamboat New World vs. King, 16 Howard, 469.

New York Central Ry. Co. vs. Lockwood, 17 Wallace, 357.

Norfolk Southern Ry. Co. vs. Chatman, 244 U. S. 276.

In the comparatively late case of Norfolk S. Ry. vs. Chatham, 244 U. S. 276, it is definitely announced that a care-taker though riding on a pass is a passenger for hire, and that the carrier can not contract against his negligence.

THIRD

The court erred in instructing the jury in substance that Ellzey's right of recovery would be defeated if he acquiesced in the negligent operation, or failed to abandon the car at the earliest possible moment to avoid the consequences of negligent operation, because there was no evidence tending to show that Ellzey knew the car was being operated at a dangerous rate of speed, and because he did not owe the duty of setting up his judgment aaginst that of the operator; and it was the duty of the operator to protect his charge or guard from the dangers of negligent operation; and Ellzey had the right to rely upon the operator's supposedly superior judgment as to the speed of the car.

10 Corpus Juris, Section 1490, page 1107, 6 CYC, page 641.

Inland Sea Board Coasting Co. vs. Tolson, 139 U. S. 558.

Pennsylvania Ry. vs. Reed, 60 Fed. 694; 9 C. C. A. 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 Fed. 4; 112 C. C. A. 583.

(Note-588) Reviewing authorities from various states.

FOURTH

That inasmuch as Ellzey, a passenger for hire, could not contract in advance to relieve the carrier from its negligence on the trip, he can not be held to have impliedly so contracted by encouraging, acquiescing in, or failing to protest against the negligent operation, or failing to abandon the car "at the earliest possible moment."

Weisshaar vs. Kimball S. S. Co., 128 Fed. 597; 63 C. C. A. 139.

These propositions are raised by our various assignments of error copied in Appendix to this brief.

The propositions will be discussed in their order.

I.

The court erred in refusing to give Special Charge "A" directing a verdict for plaintiff.

The plaintiff having in his special charge "A" asked the court to direct a verdict in his behalf, the court should have directed a verdict for the plaintiff because there was no evidence whatever tending to relieve the defendant of liability.

Plaintiff's Requested Charge "A":

"You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of speed,

therefore you will return a verdict in favor of the plaintiff for the damages he has sustained." (R-206)

The court refused plaintiff's peremptory instruction, and directed a verdict for the defendant, if Ellzey directed, encouraged, acquiesced in the speed, or failed to protest against it, or failed to abandon the car, saying: (R-205)

> "In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence."

It was clearly the duty of the court to have directed a verdict in the case, and the right of plaintiff to such directed verdict will be more fully presented under our next propesition.

II.

The court should have directed a verdict in favor of the plaintiff, because the uncontroverted evidence showed that at the time of the wreck the plaintiff was a passenger on said car, or the relations such that defendant owed him the duty of special protection, and the uncontroverted evidence showed, as well as the admission in the answer of the defendant in error, that the wreck was caused by Merchant negligently running the car at a dangerously high rate of speed, and there was no evidence showing or tending to show that the plaintiff was guilty of contributory negligence, or that any other circumtance existed which

would deprive the plaintiff of his right to recover for the damages sustained; and the uncontroverted evidence showed that the plaintiff sustained great damage to the amount of several thousand dollars.

The plaintiff groups his First, Second, Third and Fourth Assignments or Error, (R-277-8), and his Thirteenth Assignment of Error, (R-233) each of which in varying forms present the contention that the plaintiff was entitled to a peremptory instruction.

Before presenting excerpts from the testimony supporting our contention, we call the attention of this court to the case of Weisshaar vs. Kimball, S. S. Co. 128 Fed. 397; 63 U. S. C. C. A. 139—certiorari denied by the Supreme Court, 194 U. S. 638, for a discussion of the rights, duties, responsibilities and liabilities of the carrier in protecting his pasesngers. This was a case where a boat was overloaded and the person in charge contended that the passengers had taken charge, urged and practically forced him to proceed on the trip that resulted in the boat being sunk by being overcrowded, and appears to be an unanswerable pronouncement of the law in our favor. The court said:

> "Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky,' it became the duty of all the passengers to get out—as well as those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made

nothing more than a milk and water protest against the entry of anyone; *and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe.* Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

We may add that it appears that no authority can be found which holds that a passenger will be guilty of contributory negligence by acquiescing in, or even encouraging the carrier to operate the carriage at high speed.

In examining the evidence to determine whether the issue of contributory negligence was raised, this court will look to the situation of the parties, as their conduct must be measured by their responsibility.

There exists in every honorable guard a pride to faithfully discharge his duty and give full protection to the person or thing entrusted to his keeping or protection, which impels him to do all that is in his power to discharge his duty; and which would cause him to shudder at the thought of abandoning his charge to the very dangers from which he has agreed to protect him—the law must not be given such a twist as to encourage, much less require the guard to abandon his trust.

Under the direction of the Attorney General of the United States, Ellzey, United States Deputy Marshal, was assigned to duty on the K. C. S. Railway, at its urgent request during the general shopmen's strike of July, 1922. (R-133)

On August 10th, 1922, under direction of its superintendent, Ellzey was guarding a telegraph lineman against threatened personal violence while the lineman was traveling over the road on a motor car to make repairs on the telegraph line. By reason of the lineman operating the car at a negligent reckless rate of speed, it was derailed, and Ellzey seriously and permanently injured.

> There was no testimony which tended to show that Ellzey commanded the fast running, and very meager testimony that he encouraged or acquiesced in the speed, and no testimony that he knew or appreciated that it was dangerous to run the car at the rate of speed at which it was being operated.

There was no protest or objection made by the operator of the car against running it at the high rate of speed.

The evidence offered by plaintiff to sustain his charge of fast running, was with reference to the speed of the car as it left the Rose Pine station, a few hundred yards before the wreck. There was no evidence of fast running at any other place other than the contention made by the witnesses, Adams and Merchant —that at Carson, Merchant had stated in substance that he was about through with his wild riding.

Merchant, the operator of the car, testified unqualifiedly, Transcript, (R-151) that he had the right to operate the car on into Leesville, and no witness testified to any fact or circumstance remotely hinting that Merchant was not acting within the scope of his employment when the wreck occurred, we dismiss that as a conclusively proven fact, and inasmuch as the defendant alleged in its answer that the wreck was caused by fast reckless running of the car, and that the evidence conclusively showed that it was being operated at a dangerously high rate of speed, we might with safety treat that as a definitely settled fact in the case, and proceed to examine the record for the purpose of determining whether there was any evidence remotely tending

to show that Ellzey was guilty of contributory negligence, which barred his right of recovery.

Inasmuch as we seriously and confidently insist that there is no evidence in the case which raises the issue of Ellzey's contributory negligence, we have for the benfit of the court and ready access thereto, copied from the transcript of the evidence all of the testimony offered by the defendant which remotely hints at the conduct of Ellzey relied upon by the defendant to establish contributory negligence in coercing, encouraging, or acquiescing in the operation of the car, or failing to abandon it, and annexed in to the end of this brief as "Appendix B."

The witness, Adams testified for defendant, (R-136-137), "that Merchant and Ellzey said they were going to Leesville ahead of train No. 2, and that he told Ellzey he didn't think they had time to go to Leesville, and Ellzey said he would go if the motor car stayed on the track. Merchant said that he was about through with his wild driving, and Ellzey said that they would have some more of it if it stayed on the track."

He also testified, Transcript of Record, "that Merchant said he preferred to leave the car at Carson or DeRidder because they didn't have time to go further ahead of No. 2, and that Ellzey said 'he was going to Leesville ahead of No. 2 if it stayed on the track.' "

While I have copied from the transcript and attached as Appendix B, all of the testimony relating to the contentions of the witnesses of the defendant as to what is relied upon to show Ellzey was guilty of contributory negligence, the above statement of the evidence puts it in the strongest form that can possibly be contended for, consistent with the facts as disclosed by the Railway in the case.

R. E. Ellzey testified, Record 37, "that he had never had any experience in running or operating motor cars, never rode one before, had no experience in the operation of railroads, had

never worked in the train service, or done any kind of railroad work."

On page 73, Record, he testified, "that he was sent with Merchant, and that he would have taken the risk of losing his job if he didn't stay with him."

On page 81, Record, he testified: "I was just risking myself in his hands while I was with him because he knew the car, and I didn't. I left the operation of the car up to him, and he left the protection part up to me."

Ellzey testified unqualifiedly that he never urged, caused or advised Merchant to carry the car to Leesville, and that he merely accompanied Merchant as a guard in accordance with the instructions given him by J. E. Murphy, general superintendent of the defendant. No witness testified that Ellzey knew anything about operating a motor car, or the speed that could be made with safety.

ARGUMENT

It will be observed that we are confronted with a case when stated most favorably to the defendant—where a United States Deputy Marshal, in the pay of the Government, doing guard duty received injuries by reason of the motor car on which he was being carried having been negligently operated at a dangerously high rate of speed, and that the Deputy Marshal advised the continuation of the trip when the operator of the car expressed a desire to desist from making the trip, and Ellzey acquiesced in the high rate of speed that the operator was expected to thereafter make.

There is not a scintilla of evidence that tends to show force or coercion on the part of Ellzey. The evidence referred to (and it is the strongest in the record) does not raise the issue of Merchant having even made a "milk and water protest" as to the trip or fast running. See *Weisshaar vs. Kimball* S. S. Co., 128 Fed 397.

Under these circumstances, it is our contention that the evidence does not remotely raise the issue of Ellzey's contributory negligence.

Ellzey was unquestionably a passenger for hire on the car, or the relations were such that it unquestionably owed him the same duty—that is a very high degree of care, and could not directly or impliedly contract against its negligence.

The doctrine of Ellzey being a passenger for hire is no new doctrine, and is firmly established in the jurisprudence of this country, and especially by the decisions of the Supreme Court of the United States in what is commonly known as "Drovers Pass" cases, where the tender or guard of live stock riding on a pass is held to be a passenger for hire—certainly the tender or guard of the carrier's own employee under general strike conditions, is in as favorable situation as the guard of live stock, which is being handled or carried as freight. See Drovers Pass cases as follows:

Indianapolis & St. Louis Ry. Co. vs. Horst, 93 U. S. R. 291.

Philadelphia & Reading Ry. Co. vs. Derby, 14 Howard, 486.

The Steamboat New World vs. King, 16 Howard, 469.

New York Central Ry. Co. vs. Lockwood, 17 Wallace, 357.

Norfolk Southern Ry. Co. vs. Chatman, 244 U. S. 276.

In the comparatively late case of *Norfolk S. Ry. Co. vs. Chatman*, 244 U. S. 276—it is definitely announced that a caretaker though riding on a pass is a passenger for hire and that the carrier cannot contract against his negligence.

The plaintiff's Special Charge (A) directing a verdict for plaintiff should have been given. It was the duty of the carrier to protect the passenger insofar as it was practical to do so.

The operator of a carriage can not by heeding the urge of the passenger place the burden of contributory negligence upon him.

The passenger is presumed not to have equal information with the carrier, either as to the safety of the conveyance or the speed it is capable of making with safety.

Weisshaar vs. Kimball S. S. Co. 128 Fed. 397; 63 C. C. A. 139.

Lynn vs. Southern Pacific Company, 24 L. R. A. 710.

Hutchinson on Carriers, 2nd Edition, Sec. 654c.
Little vs. Haskett, 116 U. S. 371.

The right to make a direct contract against negligence being denied by law, there can be no implied contract relieving the carrier by attempting to class it as contributory negligence growing out of the passenger's suggestion of fast driving.

If Ellzey was guilty of contributory negligence in urging fast running, Merchant knew it, and it was his duty to protect Ellzey against his own negligence.

10 *Corpus Juris, Section* 1490, *page* 1107; 6 *CYC, page* 641.

Inland Sea Board Coasting Co. vs. Tolson, 139 U. S. 558.

Pennsylvania Ry. vs. Reed, 60 Fed. 694, 9 C. C. A 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 Fed. 4, 112, C. C. A. 583.

(*Note*-588) *Reviewing Authorities from various states.*

It is believed to be so clear that a passenger can not be guilty of contributory negligence in urging high speed in that it would defeat the purpose of the law, that one only has to remember that a passenger could

not make a contract in advance with the carrier that he would assume the risk growing out of the speed to be made on the journey when it reached the point of constituting negligence upon the part of the carrier.

Plaintiff could not be guilty of passive contributory negligence. Therefore the court erred in so charging in Supplemental Instruction.

The plaintiff in his special instruction No. 3 requested the court to give the reverse of this Special Charge (which the court refused). See Court's Charge, Record, page 205 and plaintiff's special charge No. 3, (R-230).

Even if the plaintiff could have been guilty of negligence in the encouragement of the speed (as he could not without taking command of the car and ousting the carrier of control) he certainly could not relieve the carrier by merely passively failing to protest.

It will be noted that in the supplemental charge given, the court placed on plaintiff the burden of contributory negligence, if a person of ordinary care situated as he was would have appreciated the danger; certainly if any such theory as passive contributory negligence could apply to a passenger, it would have to appear that he knew and appreciated the danger, (and not that a person of ordinary care would have known and appreciated the danger) and that with full knowledge of the danger had an opportunity to avoid its consequences, and failed to do so.

The doctrine of imputed negligence applies to injuries inflicted by third persons and not to injuries inflected by the carrier.

It is a doctrine as old as the law of carriers that the passenger entrusts himself to the care and custody of the carrier, relying and having the right to rely upon the carrier's supposedly superior knowledge in the selection of the means of carriage, and the control of the manner of operation. That the carrier

obligeth himself to carefully transport and safely discharge at the end of the journey.

It is likewise settled in all the jurisdictions in this country, that the passenger can not contract with the carrier to relieve it of the responsibility of its negligence or that of its servants; and that where the passenger has negligently placed himself in a situation of danger, or has been guilty of contributory negligence which might result in injury to him, that if the carrier ascertains the situation of the passenger or the existence of his negligence, that the duty devolves upon the carrier to protect the passenger against injury that might result from such negligence.

Applying these propositions that are so old and well settled as that none can afford to admit ignorance thereof to this case, we are driven to the inevitable conclusion that the carrier is responsible to Ellzey for the loss sustained by him.

It is believed that the authorities may be searched in vain for the establishment of a rule that would suggest that the evidence in this case is sufficient to raise the issue of Ellzey's contributory negligence.

I pause to here remark that I confidently believe that honesty and fairness, the fundamental principles of right and justice demand the establishment of the doctrine—

That where a quasi public corporation appeals to the majesty of the National Government for protection of its new employees in its effort to break a general strike, that while the guard may assume the risk or undertake the danger incident to injury from third persons, that the railroad is unqualifiedly responsible to him as an insurer against injuries by its own employees.

There is a presumption that the operator, and not Ellzey knew the car and its capabilities, and Ellzey could not be held responsible for the wreck unless he forced the driver, thereby taking over the operation of the car.

There was no evidence to support such a theory.

Ellzey swore (Trans. of Record 48) that he knew nothing of the condition of this car or any other motor car—had never rode one and had no information as to speed it was capable of making. This was not disputed.

Ellzey, a passenger, could not be guilty of passive contributory negligence, neither could he be guilty of active contributory negligence in directing the operation of the car, unless his conduct amounted to taking over the car and forcing its operation.

A passenger can not make a solemn written contract relieving the carrier of its responsibility for negligence. Therefore, a passenger can not by giving instructions or advice be guilty of contributory negligence —certainly he can not be guilty of such negligence by failing to set up his judgment against that of the carrier, or passively accepting the conduct of the carrier.

There is no evidence of coercing or driving upon the part of Ellzey.

There was not sufficient evidence to raise the issue of the car being used beyond the scope of Merchant's authority. Therefore, Ellzey was a passenger.

There are three propositions upon which it seems to us that a new trial must inevitably be granted.

That the court erred in instructing the jury in effect that Ellzey while a passenger could be guilty of passive contributory negligence, and further that he could be guilty of such contributory negligence by failing to do that which a person of ordinary care and prudence would have done in the way of trying to check the speed of the car under the circumstances of the situation.

In the first place, a passenger can not be guilty of contributory negligence in directing or encouraging the manner of the operation of the car—such contributory negligence would amount to a contract on the part of the passenger to relieve the carrier of his negligence.

Certainly the passenger could not be guilty of passive contri-

butory negligence where a person of ordinary care and prudence would have acted differently to that which the particular passenger did. In other words, if it were possible for the passenger to be guilty of passive contributory negligence in such a situation, he could only be guilty of contributory negligence where he *knew* and *appreciated* the danger, and *with that knowledge failed* to act as a person of ordinary care would have acted. It is not what a person of ordinary care would have done, but what a person of ordinary care *having the information of danger, if any,* which *Ellzey* had, would have done.

A great number of cases could be cited to sustain this proposition, but it seems that only a few are necessary.

It is really the duty of the carrier to protect the passenger against his own negligence instead of acquiescing in his negligence to his injury.

Hutchinson on Carrieds, Second Edition, Sec. 654c.

Weisshaar vs. Kimball S. S. Co., 128 *Fed.* 397, 63 *U. S. C. C. A.* 139, *certiorari denied by the Supreme Court,* 194 *U. S.* 638. It appears the U. S. Sup. Ct. approved this case inasmuch as a writ of certiorari was denied. *Lynn vs. So. Pac. Co., Cal.,* 24 L. R. A. 710.

Where the relation of carrier and passenger exists, the law obligeth the carrier to protect him from all injury that can be avoided by the exercise of that very high degree of care consistent with the nature of the business in which the carrier is engaged.

In the Weisshaar case, it appeared that Weisshaar was drowned by the sinking of a boat that was being used to carry passengers from the shore to the ship anchored in the bay about a mile and a half from the beach. It appeared that before the boat left the beach the second mate, who was in command of the boat, notified those that were in it that it was overcrowded, and asked some of them to get out and wait until the boat could re-

turn for them. The officer continued to protest that the boat was overcrowded.

The Trial Court held that deceased was guilty of contributory negligence in remaining in the boat after he and other passengers were notified by the officer in command that the boat was overcrowded, and were asked to leave the same.

The commander testified that he had no power to prevent them from overpowering the boat.

> "They took the command away from me, and took control of the boat, and I could not do nothing."

The court in setting aside the decree of the Trial Court said among other things:

> "A careful perusal of the entire testimony of this witness, of itself, shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce."

The case of *Lynn vs. So. Pac. Co.*, 24 L. R. A. 710, is also in point.

It is believed that there is no substantial authority sustaining the contention that the negligence of the carrier can be imputed to the passenger in any action by the passenger against the carrier for injuries wrongfully inflicted upon him.

The defendant seems to have fallen into the error, and probably the trial court also, of confounding the doctrine announced by the courts of some states to the effect that in some instances where the passenger is a point operator of the vehicle, or is in control thereof, or assumes the authority to manage the same, that the negligence of the driver will be imputed to the passenger in *those cases in which the passenger is attempting to recover damages for injuries negligently inflicted upon the passenger by third*

persons—a very different situation to that in which the passenger as here is endeavoring to recover damages against the *carrier* for the mis-conduct of the driver.

With reference to the instrumentalities used for the trip, such as the conveyance, the track, and the personal conduct of the driver, the passenger is at law presumed to be wholly ignorant of the soundness of the instrumentalities and the speed capability of the vehicle, and in the very nature of things is required to subject his will and opinion with reference to the use of these instrumentalities, to that of the driver who is entrusted with the trip, and whatever the relation between the parties in a suit by the person making the trip subject to the discretion of the driver, the courts have not permitted the owner of the vehicle engaged in the enterprise, to suggest that the person being carried, has by encouraging the speed become guilty of contributory negligence that will defeat his recovery. *Little vs. Hackett,* 116 U. S. 371.

Under the theory set forth by the trial court in this case a passenger for hire is presumed to know as much as the carrier about the carrier's business; he is presumed to have an equal voice with the carrier in the management of the business; and, if the carrier operates his business in a negligent and dangerous manner, and the passenger, hapless ignoramus though he may be, fails to object and is injured by such negligence, he loses his right to recover damages from the negligent wrong-doer.

This theory is in conflict with every decision upon the liability of carriers; and we shall attempt to demonstrate its absurdity by offering example.

Suppose, let us say that a railway company undertakes to transport a passenger upon one of its trains and that, because of delays, the train is late and must run at a speed of eighty miles an hour over defective track in order to catch up with its schedule. This, of course, would be negligence and an ordinarily prudent man situated as the passenger was would probably have

realized that it was negligence for the train to run at such speed over such a track.

However, if the negligence of the railway company caused the train to wreck and the passenger was injured thereby, we can hardly imagine a court of law saying that the fact that the passenger did not actively protest against the fast running would deprive him of his right to recover damages from the negligent wrong-doer—although the trial court has practically done so in the case at bar.

In other words, the passenger entrusts himself to the carrier; and the carrier, because of the very nature of his business, becomes responsible to the passenger for the manner in which the vehicles are run—whether the vehicles used are motor cars or parlor cars. To hold otherwise would be to apply communism to railroading, and would force passengers to take a voice in the operation of all trains—which would be impractical, to put it mildly. We think that the law is that a *passenger, so long as he remains a passenger, cannot be guilty of negligence in the manner of operation of the vehicle.*

It is only when he has forcibly taken such control of the situation as to make the transaction a joint enterprise that the duty of exercising care shifts from the carrier to the passenger. (Weisshaar vs. Kimball S. S. Co., Supra).

In the present case there is not a scrap of testimony tending to show that Ellzey had "taken charge." If a passenger in a train had suggested or insisted to the conductor that he ignore orders and proceed past a meeting point, the conductor had done so, and a collision, in which the passenger was injured, had resulted, would the carrier have been permitted to plead the passenger's contributory negligence as a defense? We do not think so. As the carrier has full control of his vehicles and his agents, he must also take full responsibility for both when a passenger's rights are involved. (In the present case, it will be remembered that Ellzey was an employee of the Federal Govern-

ment and that he had no control over the motor car and no control over the driver, Merchant).

In this particular case Ellzey as guard entrusted himself to the care of Merchant. The Railway Company furnished the track, the vehicle and the driver.

In the very nature of things, the guard was not entrusted with the management of the vehicle.

A careful perusal of the testimony discloses that the testimony of the defendant, if it were conceded that it were true, does not go further than to intimate that Merchant made a half hearted protest against driving the car to Leesville.

The testimony is conclusive that he had the right to take Ellzey on the car to Leesville, and that he undertook to do so, and that the carrier by retaining him in its employ for almost two years thereafter, ratified and approved his conduct.

The mere suggestion that the driver preferred not to go to Leesville was wholly insufficient to apprise Ellzey that he was exceeding his authority or to fix upon Ellzey the burden of assuming responsibility for his acts.

We call attention to the fact that the evidence in this case is nothing like so strong in favor of the defendant in error as was the evidence in the Weisshaar case, and yet in that case, the court frankly announced that the issue of contributory negligence as to those in that boat was not raised by the evidence.

It is of course unnecessary to cite authorities to sustain the contention that a person riding in a conveyance as guard for stock, or for a man or men is a passenger for hire, and that the carrier can not contract against liability for negligence that may result in injury to them.

See *Norfolk Ry. Co. vs. Chatman,* 244 U. S. 276, and innumerable authorities.

In support of our contention to the effect that if Ellzey had been guilty of contributory negligence (and he was not), in urging Merchant to drive the car to Leesville, or urging him to in-

crease the speed thereof, that the subsequent negligence of the defendant in running the car at a high rate of speed was the proximate cause of the injury—in fact that the conduct of the carrier amounted to affirmative active negligence in a situation where it was its duty to have protected its charge or passenger against his own negligence, I cite the following authorities.

This rule of law so definitely applicable to passengers is in a measure the re-statement of the last clear chance doctrine:

In 6 *CYC, page* 641, it is said:

> "The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well recognized rule that if the negligence of the passenger is known to the servants of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of his servants in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause."

Authorities from a number of states are cited in support of this doctrine. Also English case of *Rodley vs. London, etc., Ry. Co.* 1 *App. cases* 754, 46 *L. J. Exch.* 573; 35 *L. T. Rep. N. S.* 637, 25 *Wkly Rep.* 147; 9 *Cenly. Dig. Title* ~~Commrs.~~ Carriers *Sec.* 1354.

In 10 *Corpus Juris,* page 1107, it is said:

> "The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury, leads to a well recognized rule that, if the negligence of the passenger is known to the employee of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required by carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury,

which fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause."

Quite a number of authorities from various states are cited in support thereof, and when we turn to the courts of the United States, we find that in the case of *Chunn vs. Washington City Railway Company*, 207 U. S. 302, the doctrine is announced by the Supreme Court of the United States. Also *Inland Sea Board Coasting Company vs. Tolson*, 139 U. S. 558, where the following instruction was approved:

> "There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and dis-entitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

Also *Norfolk* x *A. Trminal Co. vs. Rotolo*, 112 C. C. A. 585, and note reviewing authorities.

Same case 192 Federal 4.

Among other things in the Tolson case, 139 U. S. 551, the court says:

> "The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet the officers of the boat knew just where and how he stood, and might have avoided him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts the defendant's negligence was the proximate, direct and efficient cause of the injury."

Defendant is confronted with the rather awkward situation that the carrier pleads that Merchant was running the car at an excessive rate of speed, and that Ellzey acquiesced therein or

encouraged it, but defendant does not even contend that he coerced or forced such speed.

The law in such state of the case made the defendant liable for the failure of Merchant to protect the plaintiff, as it was plainly under the authorities, the duty of Merchant to have protected the plaintiff against his negligence, if any there was.

This duty arose because if plaintiff was guilty of negligence Merchant should have refused to do that which would result in injury to the plaintiff from such negligence. Also plaintiff being a passenger no contract express or implied could exist that would relieve the Company of Merchant's negligence.

Inevitably under the defendant's answer, it was unconditionally liable to the plaintiff in the absence of proof and a finding that the enterprise had been abandoned, and Merchant and the plaintiff were engaged in a mission of their own.

There is in fact no evidence that tends to show that Merchant was exceeding his authority in taking the car over the track, as he testified that he did have the right to take the car over the track to Leesville if he wished to do so, and no one disputed that testimony; and none of the testimony is sufficient to raise a substantial issue that he was forced or coerced by the plaintiff into taking the car over the track to Leesville; nor was there any substantial testimony tending to raise the issue that the plaintiff demanded or coerced Merchant to drive the car at a reckless high rate of speed; and inasmuch as the plaintiff could not under any circumstances be guilty of contributory negligence relieving the carrier, no defense whatever was made.

It seems very clear that the plaintiff was a passenger at the time he was injured, and that the court should have granted the plaintiff's request for a peremptory instruction to that effect.

A person riding under the circumstances under which plaintiff was being carried on the motor car is clearly a passenger, and entitled to that very high degree of care and protection guaranteed to the passenger by the law of passenger carriers.

Merchant was the boss of the situation; the captain of the ship; the officer in command, so to speak.

The cases cited in support of our contention are what is commonly known as "Drovers' pass cases" or in other words, cases where persons are permitted to ride on freight trains as care-takers of live stock. Certainly the care-taker or guard of an employee under "strike conditions" who had to guard the employee who was entrusted with the duty of keeping open the telegraph lines so that interstate trains could be operated, was on as favorable footing as a care-taker of live stock on a freight train. It is probable that he was on a better footing. In fact, it would be in keeping with fairness, common sense and justice, and will probably be held finally by the United States Supreme Court, to lay down the rule that such guard under such circumstances is unconditionally entitled to recover where his injury results from the negligence or misconduct of any of the servants of the carrier, and certainly where it results from the negligence of the person that he is guarding. That is to say, that a carrier is an absolute insurer of the guard's safety, to the extent that he will not be injured by the culpable negligence of the servants. In the nature of things the guard may have taken the responsibility of being injured by outside interference; that is what he was there for, but as to the defendant's appliances, instrumentalities and the conduct of its servants, he was insured against injuries. However, what I have said with reference to the absolute and unconditional liability of the defendant, is not attempted to be supported by adjudicated cases, but is stated on the basis of common fairness, honesty and justice.

Coming now to a discussion of the high degree of care incumbent upon the Railway Company in this case, I call attention of the court to the fact that the plaintiff had nothing whatever to do with the selection of the instrumentalities or the control thereof. He was sent out with the specific duty to "guard Merchant until he should return to Shreveport."

The duty required of the defendant in safely transporting and caring for Ellzey can not be more aptly and clearly stated than by a quotation from the case of *Indianapolis Railway Co. vs. Horst*, 93 U. S., page 296—where the learned judge after having referred to the liability of the Railway Company to a passenger accompanying his cattle on a freight train, as set forth in *Railway vs. Locke*, 17 *Wallace*, 357—used the following language:

> "The highest degree of carefulness and diligence is expressly enacted." This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in the case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same consideration apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it."

To raise the issue of contributory negligence on the part of Ellzey, it must be admitted he was a passenger, and there must have been substantial evidence showing that he, with knowledge of the dangers that might result, coerced and forced Merchant to operate the car at a dangerous rate of speed, thereby causing the wreck. That is to say that the carrier selected the vehicle, and

undertook the job charged with a superior knowledge of its fitness, and legally responsible for it being adequate and sufficient for the purpose for which it was to be used, and absolutely and unconditionally bound itself to exercise a very high degree of care in the operation thereof for the safety of the passenger. It is believed that nothing short of coercion or force could excuse the character of conduct that amounted to negligence on the part of the carrier, and certainly the conduct which the defendant in its answer admitted amounted to a reckless disregard of the safety of the passenger that the law charged it with the duty of protecting.

There was no conduct on the part of the plaintiff substantially raising the issue of contributory negligence as applicable to the facts of this case.

It it were possible to construe the testimony of Merchant and Adams so as to claim that the plaintiff was guilty of such conduct at the station Carson as to raise the issue of contributory negligence, the subsequent negligence of Merchant's fast running was the proximate cause of the injury, and there was no evidence whatever tending to show such facts as would excuse the defendant from responsibility therefor.

In the California case, *Lynn vs. Southern Pacific Co.*, the defendant had permitted its car to become overcrowded with passengers, and therefore making it necessary for the injured person to ride on the platform. The court uses this language:

> "The defendant should not have allowed so many passengers to have gone upon its cars, and if it was unable to prevent them from doing so, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platform, it was under obligations to exercise the additional care commensurate with the perils of danger surrounding the passengers by reason of the over-crowded condition of the cars."

This is but a reiteration of the common sense doctrine that

the carrier is the boss of the situation, and that he has the right in fact it is his duty to refuse to proceed in the face of danger. It is believed to be a mockery to even suggest that Merchant was forced to carry Ellzey on the motor car either from Carson on, or from DeRidder on. Merchant had the right, the privilege and it was his duty to refuse to proceed unless he was willing to bind his master by making him responsible for the outcome of his conduct if he did proceed. Ellzey was merely accompanying him to protect him from outside personal violence. He was clothed with the power; the master had placed him in charge of the situation, and was responsible for his every act unless such act was in open violation of instructions or rules, and so unless plaintiff knew that he was acting in such violation of rules. However that is purely academic, for the testimony conclusively shows without contradiction in this case that Merchant was not acting without the scope of his authority. There is not even a scintilla of testimony that remotely suggests that he was not acting fairly and exclusively in his rights.

The plaintiff here calls attention to the strongest case (*Weisshaar vs. Kimball*) apparently possible to support his position with reference to the duty of the defendant, and the inability of the defendant to escape the consequences of the wrongs committed by Merchant. It will be remembered that any conduct upon the part of Merchant tending to show that the journey was continued over his protest is very meager indeed, and that the most that the defendant can claim for such conduct upon the part of Merchant is that it was a mild protest against proceeding. He did not at any time contend that he protested against fast running, or that he was running the car at a higher rate of speed than he was willing to run it, except the very mild statement he made at Carson miles before the derailment, that "he was through with wild driving," and this statement made at the depot at Carson and not supported by any testimony whatever that remotely tended to show that they had been running the car at a higher rate of speed than was entirely safe for it to be run.

Now bearing in mind the testimony in this case, and placing upon it the very strongest construction against the plaintiff and in favor of a theory of the defendant being forced, coerced or even encouraged to run the car at a high rate of speed, I call attention to the case of *Weisshaar vs. Kimball,* above referred to, and to the important fact that in that case it conclusively appeared that a boat was overcrowded, over the protest of the person in control thereof, and that he insisted on some of the passengers leaving the boat and objected to starting on the journey unless they should do so, but nevertheless he started on the journey, the boat was sunk and Weisshaar among others lost his life. In discussing this conduct of the person in charge of the operation of the boat, Mr. Justice Ross says with reference to the testimony of the Manager of the boat:

> "At the end of his direct examination this witness was asked: 'Did you have any means or power to prevent them?' To which question he answered: 'I had no power. I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing.' "

The court further proceeds to hold unqualifiedly that if every passenger on the boat including the deceased had known of the danger, and insisted upon taking the risk, that nevertheless it was the duty of the person in control thereof to have refused to start; to have protected them; and that in acquiescing in their demand that the owners of the boat became liable for the disastrous result.

Again in the course of the same opinion the learned Judge says:

> "So here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on

that point is no answer to the gross neglect of duty by the officer of the ship."

In *Hutchinson on Carriers,* Second Ed., Sec. 654C.:

"The passenger has ordinarily no right and is not bound to interfere with the management of the carrier's vehicle or his conduct of the journey. He may ordinarily trust to the carrier's performance of his duty to safe transportation, without regard to suggestions or advice from the passenger. Thus it has been held that the passenger is not chargeable with contributory negligence because he failed to warn the engineer of an impending collision; nor does it excuse the carrier that the driver of a road-vehicle drove out of the road in the dark because the passenger suggested that he was getting out of the track."

II.

Plaintiff having requested the court to give his special charge (A), in effect a peremptory instruction to find for plaintiff, and the court having refused to give such special charge, the plaintiff then requested the court to give his special charge No. 1 as embodied in his fifth assignment of error, which we now present and discuss. (R-228-229)

Plaintiff special charge No. 1 is as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car wrecked and the plaintiff was injured.

"You are further instructed that it was the duty of the defendant's employee, Merchant, to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any proximately resulting therefrom to the said plaintiff.

"Now, if you shall believe from a preponderance of the

evidence that the said Merchant negligently ran the said motor car at a high rate of speed and that by reason thereof the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

"Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as consistent with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plainitff a car that was safe for the purpose for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purpose for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff." (R-288-229).

This charge if given, woud have eliminated from the consideration of the jury all questions of whether the employee of defendant was operating the car on an independent enterprise of his own, and all questions of whether Ellzey encouraged or acquiesced in the fast operation of the car, and would have authorized a verdict in favor of plaintiff upon the finding by the jury of negligence on the part of the defendant, either in selecting a defective car, or in negligently operating the car at a dangerous rate of speed.

The matters referred to, have been discussed in detail under our previous propositions, and we believe that the evidence conclusively showed that the car was not being operated beyond the scope of Merchant's authority, and that the plaintiff was a passenger thereon, and that the plaintiff did nothing which in view

of the situation and relation of the parties could be construed to amount to contributory negligence on his part.

The burden of proof was upon the defendant to raise by the evidence the issue of whether Merchant was operating the car beyond the scope of his authority, and as we have seen under our previous proposition, there is an entire absence of any testimony whatever that tends to raise any such defense. The burden of proof was likewise upon the defendant to introduce evidence which raised the issue of the plaintiff "ousting" the man, Merchant, and "taking command" of the situation, and forcing the negligent operation of the car which resulted in the injury to the plaintiff. The defendant has wholly failed to produce a scintilla of testimony which remotely indicates that Ellzey was guilty of conduct, which when considered in relation to the position of the parties and the relative duties of each, as it must be considered, raised the issue of Ellzey being guilty of conduct that would amount to contributory negligence.

The court not only committed the error of declining to give this special charge, but committed a double error by giving the reverse thereof in his main charge, and in special charges requested by the defendant and given by the court, and to which the plaintiff reserved exceptions.

There can be no question of the plaintiff having properly called to the attention of the Trial Judge the errors committed in the main charge and special charges given by the court, at the request of defendant; for his special charge No. 1 is in direct conflict with the theories presented by the court, and forcefully called the attention of the court to the correct theory of law that should have been presented by him to the jury; and the plaintiff also in seasonable time reserved exceptions to the court's main charge, and the special charges requested by the defendant and given, thereby giving ample opportunity for the court to have corrected the error that he had fallen into.

The court instructed the jury over the protest of the plaintiff, and to which the plaintiff excepted, and in direct conflict

with plaintiff's special charges A and 1 requested, (R-195) that it was incumbent upon the plaintiff to show that he was injured while Merchant was acting within the scope of his authority, and that if Merchant was not acting within the scope of his employment at the time of the injury, that no recovery could be had. This charge is also made the specific basis of our tenth assignment of error, (R-232).

The court also instructed the jury (R-195) in substance that the burden was upon the plaintiff in error to show that the injury occurred while Merchant was acting within the scope of his employment doing some act necessary in the discharge of his duties. The charge is also made the specific basis of our eleventh assignment of error. (-232-3).

The court also instructed the jury as follows: (R-196)

> "I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

I believe that this court will have reached the conclusion that the plaintiff's peremptory charge should have been given, but in any event it seems inevitable that the only possible issue of fact involved in this case (if there was an issue of fact, and we do not believe there was) consisted of whether Merchant was guilty of negligence in selecting a defective car, or whether he was guilty of negligence in operating the car at a reckless, high rate of speed. That is to say, whether Merchant discharged the duties that the relation of the parties in view of the situation required that he should discharge for the protection of Ellzey.

We feel that the evidence is conclusive that Merchant failed to discharge the high duties required of him in the protection of

Ellzey, but in any event we insist that he was entitled to have this issue clearly and directly submitted for the determination of the jury without being coupled with or made to depend upon issues which could not operate as a defense to this suit; and certainly without being complicated with such supposedly defensive matters as Ellzey encouraging or acquiescing in the negligent operation of the car.

The court declined to give this clear cut instruction to the jury, but on the other hand instructed the jury repeatedly that Ellzey would be guilty of contributory negligence which would defeat his right of recovery by encouraging the fast operation of the car,—nay even by acquiescing in the fast operation of the car, and even without him knowing that the car was being operated at a dangerously high rate of speed, provided a person of ordinary care in his situation would have appreciated the danger. These defenses were not in fact raised by the evidence, and in fact they constitute no defense to the cause of action of the plaintiff, and the trial court grievously erred to the prejudice of the plaintiff in refusing to give his special charge No. 1, which of course was requested subject to this right to insist upon the court giving his special charge No. A, that being a peremptory instruction to find in favor of the plaintiff the damages by him sustained.

III.

The plaintiff complains of the trial court instructing the jury in substance that if Ellzey urged or encouraged Merchant to run the car at a high rate of speed, and that by reason thereof Merchant operated it at a very high rate of speed and inflictel the in juries upon Ellzey, that Ellzey would be guilty of contributory negligence which would defeat his right of recovery. This was an erroneous presentation of the case, for, as has been pointed out, encouragement or acquiescence on the part

of Ellzey, could not operate to relieve the carrier of the high degree of care due Ellzey.

The court instructed the jury (R-196):

> "I charge you that if you find from the evidence that Merchant was authorized to carry plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

Again on page 201 of Record, the court at the request of the attorney for defendant, repeated the foregoing instruction substantially. Again after the return had returned into court and had made the following request (R-203): "We want to know what constitutes contributory negligence on the part of the plaintiff;" the court further instructed the jury that the plaintiff would be guilty of contributory negligence if he encouraged or acquiesced in the fast speed of the car. The same error was again repeated by the court, (R-205) the court adding thereto that if the plaintiff knew of the speed, and acquiesced therein, that he would be guilty of contributory negligence which would defeat his right of recovery.

Bearing in mind that the plaintiff had requested the court to instruct the jury to return a verdict in favor of the plaintiff upon the question of liability, and the court having refused this plaintiff's special charge "A;" that the plaintiff requested the court to give special charge "1," submitting to the jury the sole question of whether the defendant was guilty of negligence which proximately caused the injury to Ellzey as the only issue of fact in the case on the question of liability, we come to a consideration of the state of the record with reference to the charges given by the court on the subject of contributory negligence, and which charges were in direct conflict with the special charges "A" and

"1" requested by the plaintiff. The trial court being determined to submit the issue of the plaintiff's contributory negligence as a defense in the case, the plaintiff, after the court had refused to give his special charges A and 1, requested the court to give his special charge No. 3, and we quote from the sixth assignment of error the portion of special No. 3 specially relied upon, namely:

> "You are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car was being operated was dangerous, and unless you such danger, commanded, directed or encouraged the said Merchant to so operate the same." (R-229-230).

And again by said special charge 3 as set forth in our seventh assignment of error:

> "You are intructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the speed at which the said acr was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was, would have interfered and prevented the said Merchant from operating the car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant, and that he had the right to assume that Merchant was familiar with the condition of the car, and knew the rate of speed at which it could be operated with safety, and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence." (R-230)

We wish to emphasize the fact that we consistently protested

that Ellzey could not be guilty of contributory negligence by acquiescing in or agreeing to fast running, nor could he be guilty of contributory negligence by urging, encouraging or even demanding fast running unless he took over the command of the "ship" and ousted Merchant from control and operated it himself or forced Merchant to operate it by physical coercion. But certainly even if we were mistaken as to that contention, as we believe we were not , we had the right to have the jury told, as we requested in our Special Charge No. 3, that Ellzey would not be guilty of contributory negligence by encouraging the operation of the car, when some other person would not have done so, but that it must first appear that he knew it was dangerous to operate it as he was encouraging it to be operated, or as he was acquiescing in it being operated.

The plaintiff having in mind that in case the court should persist in submitting that theory of defense, and after the court had ruled that Ellzey could be guilty of contributory negligence by encouraging or acquiescing in the excessive speed, not only protested against the charge of the court, but by repeated requests endeavored to have the court to at least tell the jury that the plaintiff could not be guilty of contributory negligence in acquiescing in fast speed, unless the plaintiff had actual knowledge of the danger to him from such fast speed. In other words, it is not a question of what an ordinarily prudent man would have known and appreciated and done, but a question of actual knowledge on the part of Ellzey for the reason that if a passenger can be guilty of contributory negligence by encouraging or acquiescing in fast speed (as we believe he cannot) he cannot under any circumstances be held to be guilty of contributory negligence as to the speed of the vehicle, unless the particular passenger who is sought to be charged with the contributory negligence knows of the speed and that it endangers his safety. It matters not what some other person would know or think or believe, for the carrier has undertaken to transport and safely deliver the particular passenger at the end of the journey, and is

chargeable with the high degree of care to protect the passenger even against his own negligence, that is consistent with the relation of the parties.

In our twelfth assignment of error, (R-233) we complain of the court telling the jury that if the plaintiff encouraged or requested Merchant to run the car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, the plaintiff could not recover because he would be guilty of contributory negligence.

It seems that this assignment of error presents a self evident proposition of law, one that should be fundamental; and that the trial court has clearly given an erroneous instruction, which has resulted in injury to the plaintiff.

The plaintiff again complains of the trial court insisting upon submitting to the jury the issue of Ellzey's contributory negligence based upon his encouragement of fast running, as set forth in his fourteenth assignment of error, where he complains of the court instructing the jury as follows: (R-233-234)

"I charge you, gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand-car fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff because the plaintiff cannot now complain that the hand-car was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the hand car at an excessive rate of speed. In other words, if he induced or requested Merchant, gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's

negligence would have contributed approximately to the injury, which would defeat his recovery."

The plaintiff having without fruitful results requested special charge "A," which would have peremptorily instructed a verdict in plaintiff's favor on the issue of liability, then insisted on his special charge No. 1 being given, which would have submitted to the jury, as the only issuable fact on the question of liability, the issue as to whether the employees Merchant was negligent in selecting the car in question, or in the manner of its use. The court having improperly declined to give the instructions requested, and having submitted the issue of plaintiff's contributory negligence on the basis of "advising, encouraging, or acquiescing" in Merchant's negligent operation of the car, the plaintiff next endeavored to have the court correctly submit each theory (if there was any merit whatever in the contention that the plaintiff could be guilty of contributory negligence under the facts) but the court declined to give any of the said special charges requested by the plaintiff, and told the jury unqualifiedly that if the plaintiff urged or encouraged the operation of the car at the high rate of speed, and that as a result of such high rate of speed, the plaintiff was injured, that he would be deprived of his right of recovery on the ground of contributory negligence. This is so inconsistent with the great weight of authority as is shown under our previous propositions, pages __ to __ of this brief, that we deem it unnecessary to do more than here call attention to the fact that it is believed no case can be pointed out in which one occupying the relation that Ellzey occupied to the defendant, can be held guilty of contributory negligence in a suit against his carrier, by merely encouraging or acquiescing in dangerous speed and certainly that one so charged is entitled to have the jury instructed, that before he could be guilty of contributory negligence in that respect, it would be necessary for the jury to find that he had actual knowledge of the danger that he was about to encounter.

Plaintiff by his tenth and eleventh assignments of error, complains of the court having instructed the jury upon the issue of the defendant not being responsible to the plaintiff upon the theory of the enterprise having been abandoned, and Merchant not being engaged in work within the scope of his employment at the time the plaintiff was injured.

Inasmuch as there was no evidence raising the issue, and all of the testimony conclusively showed that Merchant was acting within the scope of his employment at the time the car was wrecked, it was clearly error for the court to leave to the consideration of the jury this undisputed issue in the case. It was wholly immaterial as to whether the act Merchant was doing at the time of the accident was necessary for the discharge of his duties to the Railway Company, because he testified that he was permitted and had the right to carry the car to Leesville if he saw fit to do so, and inasmuch as there was no evidence offered by the defendant, and inasmuch as the burden was upon the defendant to show that Ellzey and Merchant were out on a "lark" or enterprise of their own, there is no substantial testimony that raises the issue, and therefore the court erred in submitting this issue to the jury, and our tenth and eleventh assignments of error should be sustained.

When we consider that Merchant operated the car over the road from Carson to the place where it was wrecked, and that he testified unqualifiedly that he had the right to make the trip on to Leesville if he saw fit, and that the defendant kept him in its employ until the trial of the case, more than two years after the injury to plaintiff, we are driven to the inevitable conclusion that there was not any evidence tending to raise the issue that Merchant acted beyond the scope of his authority, and that the defendant could not in fact produce any testimony raising that issue.

IV.

I now come to consider the error pointed out by our sixteenth assignment of error, (R-235). Bearing in mind that

the jury had been considering the case for some time, and returned into open court and requested additional instructions on the question of contributory negligence, by asking the court under what circumstances the plaintiff could be guilty of contributory negligence, and bearing in mind the relation of the parties as disclosed by the evidence, I quote the charge that we complain of as a conclusive self evident argument that this assignment of error must be sustained, and the judgment of the District Court should be reversed thereon:

> "If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the position he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." (See R-234-235).

It will be observed that in the first portion of this charge the jury was instructed that if the plaintiff urged, directed or counselled the driver of the car to run it at a reckless rate of speed, that he would be guilty of contributory negligence which would bar his recovery. In other words, the court announces the very antithesis of what is announced by the court in the case of *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 597; 63 C. C. A. 139; and of all of the other cases following that decision and announcing the same doctrine, and by the way which constitutes almost the unquestioned and unbroken line of decisions on the subject.

It seems that the trial court in this case wholly disregarded the fact that under the law the passenger submits himself to

the control of the carrier, and wholly disregards the high obligations resting upon the carrier to discharge the burdens placed upon it by the decisions of the courts, and announced a rule of action in this case that would not only be detrimental to the best interest of society and the general public, but one that is without reason or argument to support it, and without justice or even the necessity of expediency to sustain it. But the court was not satisfied with thus announcing a new and novel doctrine to the effect that the passenger could be guilty of contributory negligence by urging the carrier to be negligent, but made the further startling announcement that if the plaintiff saw the car was being run at a high rate of speed, and saw that he was in danger, or worse that if a man of ordinary care would have appreciated the danger, and he continued to ride on the car without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then he would be guilty of such omission as would constitute contributory negligence which would defeat his recovery.

When we realize that there is not a scintilla of testimony in the entire record that remotely hints at the idea of the plaintiff having been guilty of negligence in failing to abandon the car, it is certainly very difficult for me, to figure out a theory upon which the trial judge acted in thus submitting the case to the jury.

When we consider the proposition in the light of the particular case as we must, and we realize that Ellzey was a guard, sent with Merchant to protect him against threatened personal violence, and instructed to prevent his being injured, it occurs to me that it is the height of absurdity to suggest that he should have left his charge because of negligence, if any, upon his part. Ellzey could no more desert his charge, than a private in the army could desert in the face of the enemy. This theory should never have been presented as a defense in this case.

The case of *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 597; 63 C. C. A. 139; is conclusive upon the contention urged by us, and this opinion seems to have met with the approval of the

United States Supreme Court in that the application for certiorari was denied, 194 U. S. Supreme Court Rep. 638.

It is true that there are a great many conflicts in the charge of the court, but one can not read the entire charge without reaching the inevitable conclusion that the court thoroughly impressed the jury, and that the jury was forced to understand, that it was an issuable fact as to whether Merchant was acting within the scope of his authority, and that even if he was acting within the scope of his authority, that if the plaintiff urged or encouraged (not co-erced or commanded) Merchant to run the car at a high rate of speed, that the plaintiff would be guilty of contributory negligence as would bar his right of recovery, even though the plaintiff may not have known of and appreciated the danger. However, the defendant will certainly be unable to point out substantial authority or furnish logical reasoning to support the theory that even if the plaintiff had knowledge that the car was being operated at too high a rate of speed, he would be guilty of contributory negligence proximately causing the injury by urging or encouraging such speed; for the subsequent negligence of the carrier in acceding to the urge of the plaintiff would have destroyed the acts of plaintiff as a defense to its liability.

An examination of the court's charge also leads to the conclusion that the court sought to impress and did impress the jury that if the plaintiff even acquiesced in the fast speed of the car, that he would be guilty of contributory negligence in not abandoning his post of duty as guard, and that such contributory negligence would defeat his right of recovery.

This theory cannot be sustained by substantial authority, and is wholly inconsistent with our present day civilization, and the theory of our government that common carriers are entitled to overcome and break strike conditions by calling to their aid in the interchange of interstate commerce the Federal Government, which furnishes guards to protect new employees against

threatened violence, but which does not undertake to require its Deputy Marshals on guard duty to take the risk of being injured by the negligence of those they are protecting against injury at the hands of others.

We call attention to the fact that conflicting charges excepted to can not sustain a judgment where it appears that the jury was impressed by the court, in fact led by the court, to accept a theory of the case, and base their verdict thereon, which is not sustained by the settled law of the land. In other words, where it appears as in this case, that a party to a suit is deprived of a substantial right when the charge is considered in its entirety, and it appears that the party has diligently endeavored to have the court correctly submit the case to the jury, the error is of such substantial proportions as that the case should be reversed to the end that substantial justice may be done.

The defendant seems prone to side-step the position taken by the plaintiff, and the authorities relied upon by him, and inject into the case an illusory and new theory that had its birth in the old case of *Thorogood vs. Bryan,* decided by the Court of Common Pleas, 1849, H. C. B. 114. This theory was to the effect that in an action by a passenger against a third party for injuries resulting to him by reason of the negligence of his carrier, combined with that of the third party, that the negligence of his carrier is imputed to the passenger; a doctrine which has really been exploded in England, and has never been recognized to any extent in this country, and which was directly repudiated in the case of *Little vs. Hackett,* 116 U. S. 366; where Mr. Justice Field points out the absurdity of visiting upon the passenger the wrongs of his carrier, even in a suit against a third person, and calls attention to the fact that the doctrine would lead to holding the passengers responsible to third persons for injuries inflicted by the negligence of the carrier, and to the absurdity of relieving the carrier from liability to his own passengers.

I am aware of the fact that some courts have recently held that one riding in a vehicle such as a carriage or automobile may

be guilty of such contributory negligence, as will defeat his right of recovery against a third person by not looking out for his own safety, but I find no cases of modern standing which hold that even as between the passenger and a third party whose negligence combined with that of the carrier to injure the passenger, the negligence of the carrier is imputed to the passenger, though in some cases the rule is announced that the passenegr may be guilty of such negligence as will relieve the third party of liability.

The defendant may cite a number of cases sustaining the doctrine of the negligence of the passenger relieving the third party, but I do not believe that it will be able to cite any reputable substantial authority that announces the doctrine that the passenger is in any case chargeable with the negligence of the carrier as here, *as between the passenger and his carrier.*

It would in my judgment be pushing a defenseless doctrine to the point of ridiculousness and absurdity to hold that the carrier can escape the consequence of his own negligent conduct by reason of the fact that the passenger did not set up his judgment against that of the carrier—to say nothing of the absurdity of a guard being denied the right of recovery because he did not abandon the person that he had undertaken to protect from personal violence.

In urging our objections to the manner in which the court presented the case to the jury in the general charge, and urging our criticism of the different paragraphs of the charge presenting the issue of contributory negligence, we are not unmindful of the fact that if the issue of contributory negligence was raised by the evidence (which we deny), that it does not necessarily follow that because the court has mis-stated the law of contributory negligence in some paragraphs of the charge, that the case must be reversed. However, the rule does prevail that if the charge taken as a whole does not correctly submit the issue of contributory negligence as applicable to the facts of the case,

the erroneous statements of the law therein contained require a reversal of the case.

It is our contention that the evidence does not raise the issue of contributory negligence on the part of Ellzey, but if this court should disagree with that contention, it will certainly reach the conclusion that Ellzey could not be guilty of contributory negligence unless he did that which amounted to wresting the control of the machine from the operator and assuming full responsibility for its movements. The charge of the court has not so limited or attempted to limit or define the law; but on the contrary, clearly impresses the jury that if Ellzey—

> Urged the operation of the car at a high speed, or
>
> Encouraged the high speed, or
>
> Acquiesced in the high speed, or
>
> Failed to abandon the car at the earliest possible moment if he recognized the high speed, or worse,
>
> That if a person of ordinary care and prudence, situated as was Ellzey, would have discovered that the car was being operated at a dangerous rate of speed and failed to abandon it at the earliest possible moment, he would be guilty of contributory negligence.

These incorrect statements of law are such as to strongly indicate, if not conclusively show, that the jury was led to reach an erroneous verdict thereby. Certainly, when we realize that there was no evidence raising the issue of the car being used beyond the scope of Merchant's authority, or if any, that it was of the flimsiest and most unconvincing character; and that there was no evidence raising the issue of Ellzey's contributory negligence, or if any, that it was merely a scintilla of evidence, are we led to the inevitable conclusion that injury was done by the erroneous statement of law and that substantial justice has not prevailed, and that therefore, the case should be reversed with directions for a new trial to be granted.

The plaintiff respectfully prays that for the many errors by the trial court committed, denying him substantial justice therein,

the said cause be reversed and remanded to the trial court for another trial on the merits of the case, and that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

JONES, JONES & BUCK,
Marshall, Texas and Fort Worth, Texas, and

O. W. BULLOCK, Shreveport, Louisiana,
Attorneys for Respondent.

APPENDIX "A"

FIRST ASSIGNMENT OF ERROR

The court erred in refusing to give to the jury the special instruction No. "A" requested by the plaintiff, which was in effect a peremptory instruction, and as follows:

> "You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car, and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of speed, therefore, you will return a verdict in favor of the plaintiff for the damages he has sustained."

SECOND ASSIGNMENT OF ERROR

The court erred in refusing to give a peremptory charge in favor of the plaintiff in that the defendant requested the court by written motion filed to instruct a verdict for the defendant, and the plaintiff by his special charge "A" requested the court to direct a verdict for the plaintiff, and there being no sufficient evidence to raise the issue of a defense in said cause, but under the uncontroverted evidence the plaintiff being entitled to recover the damages sustained by reason of the injuries he received, the court erred in submitting the said cause to the jury on issues of negligence, and in failing and refusing to decide the said cause and render judgment on the issues of negligence in favor of the plaintiff.

THIRD ASSIGNMENT OF ERROR

The plaintiff and the defendant having each by their written request asked the court to direct a verdict in this cause on the question of liability, the court erred in failing to do so, and in submitting the said cause to the jury on the question or issue of liability, but should have so decided the said cause in accordance with the said request of the said parties plaintiff and defendant.

FOURTH ASSIGNMENT OF ERROR

The court erred in refusing to direct a verdict in favor of the plaintiff as to liability because the uncontroverted evidence showed that the plaintiff was injured by reason of the negligence of the defendant and under such circumstaces as that the defendant was liable to him for the damages he sustained, and that he had sustained damages in a very large amount, and the defendant offered no evidence whatever that would justify the court in submitting to the jury the question of the defendant's liability to the plaintiff.

FIFTH ASSIGNMENT OF ERROR

The court erred after declining to give the plaintiff's peremptory instruction "A" in refusing to give to the jury the said Instruction No. 1 requested by the plaintiff as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car wrecked and the plaintiff was injured.

"You are further instructed that it was the duty of the defendant's employee, Merchant, to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any approximately resulting therefrom to the said plaintiff.

"Now, if you shall believe from a preponderance of the evidence that the said Merchant negligently ran the said motor car at a high rate of speed and that by reason thereof, the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

"Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as consistent with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plaintiff a car that

was safe for the purposes for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purposes for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff."

SIXTH ASSIGNMENT OF ERROR

The court erred after refusing to give the plaintiff's peremptory special charge "A" and plaintiff's special charge No. 1 requested in refusing to give to the jury the special instruction No. "3" requested by the plaintiff as follows:

"You are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car at such high rate of speed, and with knowledge of such danger commanded, directed or encouraged the said Merchant to so operate the same."

SEVENTH ASSIGNMENT OF ERROR

The court erred, after refusing to give the peremptory instruction "A," and plaintiff's special charge 1, requested by the plaintiff, in refusing to give to the jury the special instruction No. 3 requested by the plaintiff, in the following language:

"You are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or re-

quest the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered with and prevented the said Merchant from operation (operating) the car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence."

EIGHTH ASSIGNMENT OF ERROR

The court erred, after declining to give plaintiff's peremptory instruction "A," and plaintiff's special charge 1 and 3 above referred to, in refusing to give to the jury the special instruction No. B, requested by the plaintiff, which is as follows:

"Again you are instructed that if the plaintiff knew that the said Merchant was in fact operating the said car over the track in violation of the rules and regulations of the said company, and if the plaintiff after obtaining such knowledge had an opportunity to abandon said car at a regular station of the said defendant, and negligently failed to do so, then the plaintiff would be guilty of contributory negligence, and could not recover. However, in this connection you are instructed that the plaintiff had the right to assume and to act upon the assumption that the said Merchant would not operate the said car in violation of the rules and regulations of the said company and unless the said-plaintiff knew that the said Merchant was in fact violating the rules of the said company in operating the said car and acquiesced in and agreed thereto after an opportunity to

have abandoned the said car at a station of the defendant, he can not be held guilty of contributory negligence."

NINTH ASSIGNMENT OF ERROR

The court erred after declining to give plaintiff's peremptory instruction "A" and plaintiff's special charges 1 and 3 above referred to, in refusing to give to the jury the special instruction No. B, requested by the plaintiff which is as follows:

"You are instructed that the plaintiff would not be guilty of contributory negligence proximately causing the injury by merely encouraging the said Merchant to operate the said car at a high rate of speed unless it shall appear from the evidence that the plaintiff knew that it was dangerous for the car to be so operated at such high rate of speed. In this connection you are instructed that the plaintiff had the right to assume that the said Merchant knew the speed at which the said car could be operated with safety, but that if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate the said car at a rate of speed that was not reasonably safe, the plaintiff would be guilty of contributory negligence and could not recover."

TENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows; which was given at the request of the defendant as its special instruction No. 1:

"I charge you, Gentlemen of the jury, that while as a general rule the master is liable for the negligence of the servant, it must appear that such fault or negligence on the part of the servant was committed in the course of his employment and the master is not liable for a fault or negligence of the servant committed by him while not prosecuting the work of the master. That is, where he ceased to perform the duty for which he was employed and puts off on some other expedition or uses tools which are put in his hands for his own benefit, and not for the purpose of the

business of the company; then he ceases to be an employee of the company, and the company is not responsible for his damage. Therefore, if you find that Merchant, the employee of the Kansas City Southern Railway Company was not acting within the scope of his employment at the time of the accident to the plaintiff, it is immaterial whether Merwas negligent or not, because the plaintiff cannot recover against the defendant unless Merchant was acting within the scope of his employment at the time of the negligence charged to have been committed."

NOTE: Plaintiff reserves an exception to this charge.

ELEVENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows, and was given as a part of defendant's special charge No. "2":

"I charge you that it is not enough for you to find that Merchant was an employee of the defendant railway company in order to hold it liable for the accident of which the plaintiff complains. In order to recover for the consequences of this accident, the plaintiff must show, and you must find by a preponderance of the evidence, that the negligence of Merchant occurred while he was doing some act necessary in the discharge of his duties towards the defendant. If you find that the act that he was doing at the time of the accident was not necessary for the discharge of his duties to the railway company, then I charge you that he had ceased to be within the scope of his employment and for his acts during such time the defendant is not liable. In other words, what I have said before is that the question is to be determined reasonably by what he was doing at the time."

TWELFTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows:

"I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the

point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

THIRTEENTH ASSIGNMENT OF ERROR

The court erred in refusing to give plaintiff's special charge "A" which was in effect a peremptory charge to find for the plaintiff on the question of liability, because the uncontroverted evidence in the case showed that the said Merchant was acting for the defendant, and within the scope of his employment when the plaintiff was injured, and the uncontroverted evidence, as well as the admissions of the defendant made in its answer filed in said cause, showed that the said injury to the plaintiff was caused by the said Merchant operating the said car at an excessive and dangerously high rate of speed which constituted negligence.

FOURTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows, and is referred to in said charge copied herein as defendant's special charge No. 20:

"I charge you, Gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand car fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the hand car was running at an excessive rate of speed if he by his own conduct on request induced Merchant to run the hand

car at an excessive rate of speed. In other words, if he induced or requested Merchant, Gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery."

FIFTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which was given after the jury had retired to consider their verdict, and had returned into open court, and asked for additional instruction, and which is as follows:

"If, in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agent, who, though found from the evidence, were acting within the scope of the employment, but notwithstanding such negligence, the plaintiff himself participated in counselling, directing or encouraging in such negligence, or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery."

SIXTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the additional charge given after the jury had returned into open court, and asked for additional instruction as follows:

"If you should find that in this case the plaintiff urged, directed or counselled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a

manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence."

APPENDIX "B"

TESTIMONY OF DEFENDANT IN ERROR WITH REFERENCE TO TRIP FROM CARSON WHERE LINE WAS REPAIRED TO LEESVILLE

H. E. Adams, station agent at Carson, testified after stating that they remained at Carson for more than an hour, during which time they carried some part of the motor car to the saw mill for repair, (R-134), that he heard the conversation between Ellzey and Merchant about their going to Leesville, as follows: (R-135)

Q. Will you state the substance of that conversation?

A. Well, they said they were going to Leesville ahead of No. 2, and I told Ellzey I didn't think they had time to go to Leesville ahead of No. 2, and he said he would go if the motor car stayed on the track, and he would make it.

Q. Who said that?

A. Ellzey; this fellow Ellzey that was a guard.

Q. What, if anything, did Merchant say?

A. Merchant said that he was about through with his wild driving.

Q. Then what reply did Ellzey make?

A. He said that they would have some more of it if the damn thing stayed on the track.

Again on page 136:

Q. What did Merchant say, if anything, about leaving the car at Carson or at DeRidder?

A. He said he would prefer to leave it there because they didn't have time to go further ahead of No. 2.

Q. No. 2 going north was the train to Shreveport?

A. Yes sir.

Q. What did Ellzey say in reply to Merchant?

A. He said he was going to Leesville ahead of No. 2 if it stayed on the track.

He testified further, page 137,, that they could have boarded the train at Carson and left the motor car there.

He testified, (R-138), that he knew Merchant was a

lineman going over the track looking for trouble on the telegraph lines, and that Ellzey was a guard protecting him while doing that work, and that it was usual and customary for the lineman to travel on motor cars.

He testified on page 139, that they left Carson approximately twenty-five minutes ahead of the passenger train schedule, and that the distance to Leesville was twenty-eight miles, and the passenger train schedule 2½ minutes to the mile, or twenty-five miles per hour. He testified, Transcript 138, that Merchant was not discharged but kept working for the company.

Merchant had eighty-four minutes time to make it ahead of the passenger train, or practically twenty miles per hour.

He testified, (R-144), that in going out on the line from DeQuincy, he found trouble on the board at Singer and fixed it and proceeded north.

Continuing, on page (R-144), that there was no other trouble along the line, and no further work on the wires, and that after they left Singer they went north to Carson, and after leaving Carson, went on to DeRidder. That DeRidder is six miles north of Carson. That they made repairs on the motor car at Carson, the gas line having broken, they took it out and took it to the saw mill at Carson and had new threads cut on it.

On page 145-146, that after they repaired the car at Carson, that he and Ellzey had a conversation about the trip, in which Ellzey told him that the Special Agent at DeRidder wanted him to go back there, but that he (Ellzey) was going on north.

N. B. It is strangely inconsistent with defendant's theory that Ellzey was controlling the movement of the car northward, in that we find that Ellzey had said nothing about going to Leesville at the time they left Singer, and that Merchant was proceeding directly away from DeQuincy in traveling from Singer to Carson.

On page 146:

Q. Before you got to Carson, had you been running the car fast?

A. Yes sir.

Q. Did you make any statement to Mr. Ellzey about the speed of the car before you got to Carson?

A. No sir.

On page 146:

Q. What, if anything, did Mr. Ellzey say about the speed of the car from Carson on your trip north?

A. Well, let her go. I have got to get to Leesville ahead of No. 2.

Q. Can you recall exactly what Ellzey said about the speed or about the trip on to Leesville?

A. No sir.

Q. What did he say at the depot at Carson?

A. I was working on the switchboard, and I said something to Mr. Adams—I asked him if there was some place to get the motor car fixed at, and he said there was, and then he asked me where we were going and Ellzey told him we were going to Leesville on the motor car, and to Shreveport on No. 2. I says, I had about enough of that wild driving, and he said, we will have some more of it if the damn thing stays on the rail.

Q. Did you tell Mr. Ellzey in the presence of Mr. Adams there at the station where you wanted to stop?

A. I told him that I didn't think that we could go to Leesville for No. 2.

Q. Did you say anything about where you wanted to leave the motor car?

A. At DeRidder.

On page 147, he said he wanted to leave it at DeRidder, so the train could get it.

Q. Did you say anything to Ellzey about wanting to stop in DeRidder?

A. Yes sir.

Q. What did he say?

A. Said we were going on to Leesville where we started.

Q. Where did he tell you that?

A. At the depot at Carson.

Q. Why didn't you stop at Carson—why didn't you leave the car there?

A. There was no conveniences there and no crew for a night train to pick it up.

Q. Did you tell Ellzey that you wanted to leave the car at DeRidder?

A. Yes sir.

Q. And he said what?

A. To go to Leesville.

Q. Why did he want to go on to Leesville?

A. I don't know.

Q. So, then you went on to Leesville at the instance of Mr. Ellzey himself?

A. Yes sir.

On page 148-149:

Q. State what, if anything, Mr. Ellzey said to you about the speed of the car after you left Carson?

A. Well, we had to go through a tunnel at DeRidder (evidently means switch), and he says, "We will have to run now"—and he stopped somewhere else at DeRidder and lost about four minutes; and he said, "We sure enough will have to run now."

Q. Did Mr. Ellzey make any criticism or complaint with reference to the ability of the car to make more speed?

A. Yes sir. He said, "What is the matter with the damn thing, it won't run any more?" When we started down the hill north of Ludington, he wanted to know what was the matter with the damned thing, it would not run, and Merchant told him that one of the cylinders had stopped working. That was between DeRidder and Leesville.

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When the cylinders cut out, it reduced the speed of the car and they continued to operate on two cylinders.

On page 151, he says they (meaning linemen) used the motor car to get over the line all the time. That they left it to

be picked up—they left the motor car at different places. Ultimately to be carried back where it was borrowed.

On pages 151-152:

Q. Now you had the right to go on to Leesville?
A. Well, yes sir.
Q. You had that right?
A. Yes sir.
Q. Would not have done that if you had not?
A. Well, yes, if he insisted on going to Leesville.
Q. You might have done that even if you had not had the right?
A. Yes sir.
Q. But you had the right to go there?
A. Yes sir.

Pages 152-153—that Murphy, the superintendent, sent him from Leesville to repair the telegraph line, and sent Ellzey with him to guard him. That another lineman had been beaten up in that territory.

Page 154—that he, Merchant, got the motor car; that he tried out two before he found one that would work; that they finally started north, and the gasoline line broke before they got to Singer—in fact, about seven miles out of DeQuincy—and that they had to feed it with gasoline from a bottle.

That they finally got to Singer and repaired the line there, and on pages 155-166, that they traveled on north to Carson, still feeding the motor gas from a bottle, and stopped at Carson. That they had to push the car part of the distance from where the gas line broke, seven miles out of DeQuincy on up to Carson.

Page 156:

Q. You had told Mr. Ellzey you were going to De-Ridder?
A. I suggested to Mr. Ellzey that we stop at De-Ridder, and he said, "We will go to Leesville."
Q. Ellzey suggested that you go to Leesville?
A. Yes sir.
Q. Now, when you started out from Leesville, did Mr.

Murphy—he told you that Ellzey was to go with you and guard you, didn't he?

A. Yes sir.

Q. You knew that he was going as your guard?

A. Yes sir.

Q. That he was to protect you?

A. Yes sir.

Q. When you went—that is correct, isn't it?

A. No answer.

Q. You knew that he was to guard you?

A. Yes sir.

Q. And was to stay with you as long as you wanted him?

A. Yes sir.

Page 157:

That he left Carson and went on towards Leesville, and that he operated the car from DeQuincy up to the time the wreck occurred.

Page 205:

Ellzey did not operate the car.

Page 157:

According to this witness, they left DeRidder with twenty-one miles to run, seventeen minutes ahead of the schedule time of the passenger train.

Page 159:

Q. You and Ellzey were not frightened?

A. No sir.

Q. You didn't leave Carson and go to Leesville because you were frightened?

A. No sir.

The plaintiff respectfully prays that for the many errors by the trial court committed, denying him substantial justice herein, that the judgment of the Circuit Court of Appeals be affirmed,

and the said cause be reversed and remanded to the trial court for another trial on the merits of the case.

Respectfully submitted,

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